# The European Union's Potential Contribution to Enhanced Governance of Offshore Oil and Gas Operations in the Arctic

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# The European Union's Potential Contribution to Enhanced Governance of Offshore Oil and Gas Operations in the Arctic

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*This article focuses on the European Union (EU)'s potential contribution to an enhanced legal regime of the Arctic offshore oil and gas operations. It first briefly describes existing international law for the regulation of offshore oil and gas operations in the Arctic. The article then discusses the development of EU's Arctic policy and the EU's competence to regulate Arctic offshore oil and gas activities. Subsequently, it analyzes potential actions and initiatives that could be taken by the EU to promote high safety standards for offshore oil and gas operations in the Arctic.*

## INTRODUCTION

According to a widely cited United States Geological Survey report, about 13% of the world's undiscovered, technically recoverable oil and up to 30% of global gas reserves are in the Arctic, of which 84% is offshore.[1] This may not be good news for the Arctic marine environment. As demonstrated by the Deepwater Horizon disaster in the Gulf of Mexico,[2] there are significant risks associated with offshore oil and gas activities in marine ecosystems. The release of oil through accidents or operations of offshore platforms could cause significant damage to a fragile marine ecosystem like the Arctic. This could occur through spills from accidental blowouts at the well; accidents involving tankers transporting oil and gas; operational pollution from offshore installations, harbours and from oil tankers; accidental releases from storage or during offloading; or discharges from pipelines.[3]

Exploration and development in the Arctic requires expensive, tailored technologies as well as safeguards adapted to the extreme climatic conditions.[4] The lack of existing infrastructure and the likely high cost of any development in geographically remote and climatically harsh conditions mean that the economics of any new project will depend to a large extent on the size of discoveries and the oil price, which, in turn, will be impacted by the development of

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[1] K.J. Bird *et al.*, 'Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle' (United States Geological Survey, 2008), found at: <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

[2] United States Coast Guard, *Report of Investigation into the Circumstances Surrounding the Explosion, Fire, Sinking and Loss of Eleven Crew Members aboard the Mobile Offshore Drilling Unit Deepwater Horizon in the Gulf of Mexico, April 20-22, 2010* (United States Coast Guard, 2011).

[3] Arctic Council, 'Arctic Guide: Information on Emergency Systems and Contact Points, Overview of Environmental Risks, and Applicable Agreements' (2008), found at: <http://www.arctic-council.org/eppr/completed-work/oil-and-gas-products/arctic-guide/>.

[4] Wilson Center, *Opportunities and Challenges for Arctic Oil and Gas Development* (Wilson Center, 2014), at 3.

other sources of oil supply (for example, United States (US) unconventional oil) and alternative energies.[5]

However, as long as global energy demand increases and fossil fuels are the world's primary energy source,[6] it appears inevitable that humans may start drilling in the Arctic for oil and gas.[7] In fact, a number of companies have already been pursuing exploration projects in Arctic waters. Examples include Shell in the Chukchi and Beaufort Sea; Cairn in offshore Greenland; Rosneft/ExxonMobil in the Kara Sea; and Rosneft/ENI in the Russian Barents Sea.[8] Therefore, the key issue for offshore oil and gas operations in the Arctic is to create a legal regime that strikes a balance between possible adverse environmental consequences (e.g., oil spills) in the offshore Arctic and the economic benefits from hydrocarbon development.[9]

There is no doubt that the European Union (EU) has become a global actor. The global or international context in which the EU has sought to define its identity, promote its interests and construct its policies, is increasingly seen as the stage on which the EU must act.[10] The EU is inextricably linked to the Arctic. Three Arctic countries are EU Member States (Denmark, Sweden and Finland) and the EU maintains close relations with Iceland and Norway (excluding Svalbard) through the European Economic Area (EEA).[11]

The EU published its first Arctic policy in 2008, focusing on the (i) protection and preservation of the Arctic in unison with its population; (ii) promotion of the sustainable use of resources; and (iii) enhancement of Arctic multilateral governance.[12] As a major consumer, importer and technology provider of energy and raw materials, the EU is an actor in global energy politics[13] and it has an interest and capacity in the resource policy development in the Arctic States.[14] The EU has even committed itself to promote high safety standards for offshore oil and gas operations in the Arctic through Directive 2013/30.[15] Nevertheless, the

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[5] J. Henderson and J. Loe, *The Prospects and Challenges for Arctic Oil Development* (Oxford Institute for Energy Studies, 2014), at 1.

[6] It is projected that global energy demand will increase by one-third from 2011 to 2035. Demand grows for all forms of energy, but the share of fossil fuels in the world's energy mix may fall from 82% to 76% by 2035. See International Energy Agency (IEA), 'World Energy Outlook 2013 Factsheets, How Will Global Energy Markets Evolve to 2035?' (IEA, 2013).

[7] A. Neslen, 'Europe Rejects Ban on Arctic Oil Drilling', *The Guardian* (10 October 2012).

[8] M. Luszczuk *et al.*, 'Developing Oil and Gas Resources in Arctic Waters', in: A. Stepein, T. Koivurova and P. Kankaanpaa (eds.), *Strategic Assessment of Development of the Arctic* (Arctic Centre, University of Lapland, 2014), 71, at 76.

[9] K. Hossain and T. Koivurova, 'Hydrocarbon Development in the Offshore Arctic: Can it be Done Sustainably?', 10:1 *Oil, Gas and Energy Law* (2012), 3.

[10] M. Cremona, 'The Union as a Global Actor: Roles, Models and Identity', 41:2 *Common Market Law Review* (2004), 553.

[11] Communication by the European Commission on the European Union and the Arctic Region, COM (2008) 763.

[12] Ibid.

[13] I. Dryer and G. Stang, 'Energy Moves and Power Shifts: EU Foreign Policy and Global Energy Security' (EU Institute for Security Studies, 2014), at 11.

[14] Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 26 June 2012 on Developing a European Union Policy towards the Arctic Region: Progress since 2008 and Next Steps, JOIN(2012) 19, at 9.

[15] Directive 2013/30/EU of 28 June 2013 on Safety of Offshore Oil and Gas Operations and Amending Directive 2004/35/EC (Text with EEA relevance), [2013] OJ L178/66, Article 33.3 ('the Commission shall promote high safety standards for offshore oil and gas operations at international level in relevant global and regional fora, including those relating to Arctic waters').

EU has no territorial jurisdiction over offshore oil and gas operations in Arctic marine areas (Greenland has become governmentally autonomous from Denmark[16] and is not a part of the EU).[17] It is therefore still unclear how the EU could effectively achieve its policy objectives.

In the context of the rise of the EU as a global regulatory power,[18] this article examines the EU's potential contribution to enhancing the current international regime of offshore oil and gas operations in the Arctic. The article first offers a brief description of the current international regime for offshore oil and gas operations in the Arctic. Based on a review of the literature as well as qualitative interviews,[19] the article discusses the EU's Arctic policy, competence as well as actions that could possibly promote high safety standards for offshore oil and gas operations in the Arctic.

## CURRENT INTERNATIONAL REGIME

Globally, the most significant increase in temperature is in the Arctic.[20] Warnings about rapid sea ice melting in the Arctic have been highlighted on various occasions.[21] Regardless of the exact point in time when the Arctic will become ice free, it is fair to say that some parts of Arctic waters are becoming more accessible due to improved technologies and changes in sea ice related to climate change.[22] There are a number of global conventions that provide some regulation of offshore oil and gas operations in the Arctic.[23] The United Nations Convention on the Law of the Sea[24] (UNCLOS, in particular Art. 208[25] and 214[26]) establishes coastal States' jurisdiction in the territorial sea and exclusive economic zone. A series of

[16] Act No.473/2009 on Greenland Self-Government, found at: <http://naalakkersuisut.gl/~/media/Nanoq/Files/Attached%20Files/Engelske-tekster/Act%20on%20Greenland.pdf>, Article 22.

[17] Treaty Amending, with Regard to Greenland, the Treaties Establishing the European Communities, [1985] OJ L29/1.

[18] See generally J. Scott, 'Extraterritorial and Territorial Extension in EU Law', 62:1 *American Journal of Comparative Law* (2014), 87.

[19] Between 8-19 September 2014, the author conducted a series of semi-structured interviews with representatives from several Directorates-Generals (DGs) of the European Commission (DG Energy, DG Mobility and Transport and DG Environment) in Brussels and the Secretariat of the OSPAR Commission in London.

[20] M Strahlendorff, 'Climate Change in the Arctic' in A. Stepein, T. Koivurova and P. Kankaanpaa, n. 8 above, 19, at 22.

[21] For example, Conservation of Arctic Flora and Fauna (CAFF), *Arctic Biodiversity Assessment: Report for Policy Makers* (CAFF, 2013), at 9; J. Amos, 'Arctic Sea Ice Reaches Seasonal Low', *BBC News* (2 September 2013), found at: <www.bbc.co.uk/news/science-environment-24175773>; Arctic Climate Impact Assessment, *Impacts of a Warming Arctic*: *Arctic Climate Impact Assessment* (Cambridge University Press, 2004), particularly Key Finding 1 ('Arctic climate is now warming rapidly and much larger changes are projected').

[22] See M. Luszczuk *et al.*, n. 8 above, at 73.

[23] For a detailed analysis on the international law for the protection of marine environment from offshore oil and gas operations, see N. Liu, 'Protection of the Marine Environment from Offshore Oil and Gas Activities', in: R. Rayfuse (ed.), *Research Handbook on International Marine Environmental Law* (Edward Elgar, 2015, forthcoming).

[24] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; in force 16 November 1994) ('UNCLOS').

[25] Ibid., Article 208.1 ('Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80')

[26] Ibid., Article 214 (States shall enforce their laws and regulations adopted in accordance with article 208 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80').

international conventions and guidelines adopted under the auspices of the International Maritime Organization (IMO) are also relevant for the protection of the marine environment against offshore oil and gas activities. These include the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78),[27] the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC),[28] the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London Convention) and its 1996 Protocol,[29] as well as the non-binding 2009 Code for the Construction and Equipment of Mobile Offshore Drilling Units (MODU Code).[30] In particular, OPRC applies to 'offshore units', which means any fixed or floating offshore installation or structure engaged in gas or oil exploration, exploitation or production activities, or loading or unloading of oil.[31]

It is worth noting, however, that MARPOL, OPRC and the London Convention deal mainly with pollution (operational, accidental and dumping) from shipping. They are only of limited relevance for the prevention, reduction and control of pollution from offshore oil and gas operations. For example, Article 2 of the MARPOL specifically provides that 'discharge' does not include the release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of sea-bed mineral resources.[32] Moreover, these treaties are not designed to provide a coherent, complete system of international accords for offshore hydrocarbon activity.[33] Furthermore, none of the treaties deals specifically with industrial activity such as the operation of mobile offshore drilling units when they are on station.[34] In November 2014, the IMO adopted the International Code for Ships Operating in Polar Waters (Polar Code).[35] The adoption of a mandatory Polar Code is an initial response from the international community to address increased shipping activities in the Arctic. Its role for the regulation of offshore oil and gas operations in the Arctic so far, however, is limited.

The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR)[36] addresses the prevention and elimination of pollution from offshore sources in Annex III and its range extends throughout the North-East Atlantic. It is concerned with the prevention and elimination of pollutants as well as ensuring the sustainable use of the sea.[37]

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[27] International Convention for the Prevention of Pollution from Ships (London, 2 November 1973; in force as modified by the Protocol of 1978, 2 October 1983).

[28] International Convention on Oil Pollution Preparedness, Response and Cooperation (London, 30 November 1990; in force 13 May 1995) ('OPRC').

[29] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London, 13 November 1972; in force 30 August 1975) ('MARPOL'); 1996 Protocol (London, 7 November 1996; in force 24 March 2006).

[30] Code for the Construction and Equipment of Mobile Offshore Drilling Units (IMO Resolution A.1023(26), 2 December 2009).

[31] OPRC, n. 28 above, Article 2.4.

[32] MARPOL, n. 27 above, Article 2.3(b).

[33] Arctic Council, Protection of the Arctic Marine Environment Working Group, *The Arctic Ocean Review Project, Phase II Report, 2011-2013* (Arctic Council, 2013), at 60.

[34] Ibid.

[35] International Maritime Organization (IMO), 'Shipping in Polar Waters, Development of an International Code of Safety for Ships Operating in Polar Waters' (undated), found at: <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx>.

[36] Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992; in force 25 March 1998).

[37] K.I. Johnsen *et al.* (eds.), *Protecting Arctic Biodiversity* (United Nations Environment Programme, GRID-Arendal, 2010), at 26.

Although the OSPAR covers part of the Arctic Ocean[38], most OSPAR decisions are not Arctic-specific. [39]
Two regional instruments have also been adopted that specifically address offshore oil and gas extraction in the Arctic. The Arctic Offshore Oil and Gas Guidelines[40] propose a non-binding set of suggested best practices for oil and gas extraction designed to advise industry officials and government regulators. [41] The Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic[42] was adopted under the auspices of the Arctic Council in 2013. The Agreement commits the parties to establish and maintain national systems for pollution preparedness and response in the Arctic, to notify other parties of oil pollution incidents, to deploy available resources to monitor Arctic maritime areas (including, in some circumstances, high seas areas) for possible oil pollution incidents, to facilitate information exchange and assistance in oil spill preparedness and response operations, to coordinate joint response operations, and cooperate in joint exercises and joint reviews of operations.[43] It has not entered into force.

According to Article 208.5 UNCLOS, States, acting especially through competent international organizations or diplomatic conferences, shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities.[44] The number of recent serious oil spill incidents (e.g., the 2008 Deepwater Horizon disaster) demonstrates certain deficiencies in the way that petroleum companies conduct offshore operations and the manner in which national authorities control them. [45] The Deepwater Horizon disaster has provided a boost to the development and further strengthening of accidental pollution regimes worldwide. For example, the Mediterranean (Madrid) Offshore Protocol was finally ratified and entered into force in March 2011, 17 years after its adoption.[46] In a harsh, vulnerable Arctic marine environment, if drilling activities have to be conducted, the strictest standards and highest safety levels must be followed. By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean, the five Arctic coastal States (the US, Russia, Canada, Norway and Denmark/Greenland) are in a unique position to address challenges in the Arctic. [47] However, all States in the world, including the EU and its Member States, are obliged to contribute to enhancing the current regime to ensure a sustainable future for the Arctic.[48]

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[38] OSPAR Commission, 'Region I – Arctic Waters' (undated), found at: <www.ospar.org/content/content.asp?menu=00420211000000_000000_000000>.
[39] Interview with representative of the Secretariat of OSPAR Commission (19 September 2014, London, United Kingdom).
[40] Arctic Council, Protection of the Arctic Marine Environment Working Group, *Arctic Offshore Oil and Gas Guidelines* (Arctic Council, 2009).
[41] E. Hildreth, 'Holes in the Ice: Why a Comprehensive Treaty will not Succeed in the Arctic and How to Implement an Alternative Approach', 3 *Yearbook of Polar Law* (2011), 545, at 556.
[42] Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic (Kiruna, 15 May 2013; not yet in force).
[43] See Arctic Council, n. 33 above, at 60.
[44] UNCLOS, n. 24 above, Article 208.5.
[45] S. Vinogradov, 'The Impact of the Deepwater Horizon: The Evolving International Legal Regime for Offshore Accidental Pollution Prevention, Preparedness, and Response', 44:4 *Ocean Development and International Law* (2013), 335, at 350.
[46] Ibid., at 349.
[47] Ilulissat Declaration, Arctic Ocean Conference (Ilulissat, Greenland, 27-29 May 2008), found at: <http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf> at paragraph 3.
[48] The Future We Want (UNGA Resolution A/RES/66/288, 11 September 2012), at paragraph 1 ('We, the Heads of State and Government and high-level representatives, having met at Rio de Janeiro, Brazil, from 20 to 22 June 2012, with the full participation of civil society, renew our commitment to sustainable development and

## THE EU'S ARCTIC POLICY AND COMPETENCE

The European Commission first published its policy objectives regarding hydrocarbons in the Arctic in 2008. The document stated that support for the exploitation of Arctic hydrocarbon resources should be provided while paying full respect to strict environmental standards, taking into account the particular vulnerability of the Arctic.[49] In particular, the EU encourages the observance of the highest possible environmental standards and presses for the introduction of binding international standards, building *inter alia* on the guidelines of the Arctic Council and relevant international conventions.[50] In 2012, the Commission further stated that the EU has a vital interest in ensuring maximum safety for workers in the offshore oil and gas industry and protection of the environment. Avoiding negative environmental effects in the sensitive Arctic is crucial.[51] In 2014, the Council of the European Union (the Council) requested the Commission and the High Representative to present proposals for the further development of an integrated and coherent Arctic Policy by December 2015.[52] Although the new proposal might be delayed due to the change of the President of European Commission in 2014,[53] it is expected that a new proposal for the EU's Arctic policy will be announced in the near future.

It is a cardinal principle of EU law that the EU has the competence to adopt policies and legislation only to the extent that such competence has been conferred on it by the Member States through the EU treaties.[54] The EU does not have a specific Arctic mandate from its Member States. However, this is not an obstacle for the EU to act on issues related to the Arctic. One of the main concerns of energy development in the Arctic, particularly in the marine area (offshore), is the potential environmental impacts on the fragile Arctic ecosystem.[55] Pollution from offshore oil and gas operations, no matter whether they are accidental or operational, will result in adverse consequences for the Arctic marine environment. Moreover, while climate change creates opportunities for offshore oil and gas development in the Arctic, human activity connected with this development is expected to cause further greenhouse gas emissions.[56] The EU has a solid legal basis to take action regarding this issue, as discussed below.

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to ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.')

[49] See Communication by the European Commission, n. 11 above, at 7.

[50] Ibid.

[51] European Commission, Joint Staff Working Document: The Inventory of Activities in the Framework of Developing a European Union Arctic Policy, SWD(2012) 182, at 19-20.

[52] Council of the European Union, 'Council Conclusions on developing a European Union Policy towards the Arctic Region' (12 May 2014), at paragraph 15.

[53] On 9 January 2014, former Luxembourg Prime Minister Jean-Claude Juncker succeeded José Manuel Barroso as President of the European Commission. European Commission Press Release, 'The Juncker Commission: A Strong and Experienced Team Standing for Change' (10 September 2014), found at: <europa.eu/rapid/press-release_IP-14-984_en.htm>.

[54] Consolidated Versions of the Treaty on the European Union, [2010] OJ C83/13 ('TEU'), Article 5.2. See also R. Churchill, 'The European Union and the Challenges of Marine Governance: From Sectoral Response to Integrated Policy?', in: D. Vidas and P. Johan Schei (eds.), *The World Ocean in Globalisation Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Martinus Nijhoff, 2011), 395, at 398.

[55] K. Hossain, 'EU Energy Policy and the Arctic Region: A Balancing Interest between Environmental Responsibility and Resource Dependence', 19:6 *European Energy and Environmental Law Review* (2010), 296.

[56] See K. Hossain and T. Koivurova, n. 9 above, at 10.

According to the Treaty on European Union (TEU), the Union shall contribute to the sustainable development of the Earth in its relations with the wider world.[57] Moreover, the EU should define and pursue common policies and actions, and should work for a high degree of cooperation in all fields of international relations, in order to help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, so as to ensure sustainable development.[58] It is further provided in the Treaty on the Functioning of the European Union (TFEU) that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.[59] EU environmental policy should further contribute to the pursuit of promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.[60]

The Treaty of Lisbon has ensured that energy is now explicitly included in the list of EU competences, one mainly shared between the EU and Member States.[61] EU competences for environmental policy are furthermore linked with the shared competence in energy. This is evident in Article 194 of the TFEU, which states that EU energy policy is to be developed in 'the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment'.[62] This shared competence is not only constrained to the internal market.[63] Dating as far back as 1971, the ERTA/AETR case of the European Court of Justice (ECJ) clearly stated that the Community acquires external competence when it adopts internal legislation on the same subject matter.[64] The Deepwater Horizon disaster played a major role in the EU's realization that the risk of a major offshore oil or gas accident occurring in EU waters is significant and that the existing fragmented legislation and diverse regulatory and industry practices do not sufficiently reduce the risks for the EU.[65] Directive 2013/30 was adopted, with specific reference to the Arctic waters. The EU therefore implicitly acquired external competence regarding offshore oil and gas operations on the basis of the adoption of the Directive 2013/30 to promote, negotiate and conclude conventions with third States at both the regional and international levels.

## PROMOTING EU STANDARDS IN THE ARCTIC

[57] TEU, n. 54 above, Article 3.5.
[58] Ibid., Article 21.2(f).
[59] Consolidated Versions of the Treaty on the Functioning of the European Union, [2010] OJ C83/47 ('TFEU'), Article 11.
[60] Ibid., Article 191.1.
[61] Ibid., Article 4.2. See also T Koivurova *et al.*, 'The Present and Future Competence of the European Union in the Arctic', 48:4 *Polar Record* (2012), 361, at 366.
[62] TFEU, n. 59 above, Article 194. See also T. Koivurova *et al.*, *EU Competencies Affecting the Arctic* (European Parliament, 2010), at 24.
[63] For a general analysis of the EU's external energy policy, see B. Van Vooren, *Europe Unplugged, Progress, Potential and Limitations of EU External Energy Policy Three Years Post-Lisbon* (Swedish Institute for European Policy Studies 2012).
[64] ECJ, Case C-22/70 *Commission v. Council*, [1971] ECR.263, at paragraph 19: 'With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations". While the ERTA/AETR doctrine itself is no longer contested, the conditions of its application remain contentious. They are still the subject of both academic discussion, institutional debate and new case law.' See C. Hillion, 'ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations', in: D. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law The Classic of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010), 224, at 225.
[65] Proposal for a Regulation of the European Parliament and of the Council on Safety of Offshore Oil and Gas Prospections, Exploration and Production Activities, COM(2011) 688, at 2.

At first glance, it appears difficult for the EU to promote high safety standards for offshore oil and gas operations in the Arctic, simply because of the fact that most offshore activities happen in national waters of Arctic coastal States. Nevertheless, the EU, as an important economic bloc, is capable to directly and indirectly apply its standards beyond the EU.

### *DIRECT APPLICATION OF EU LAW IN THE ARCTIC*

Inspired by the Deepwater Horizon disaster, Directive 2013/30 was adopted with specific reference to the Arctic waters.[66] In particular, Article 20 of Directive 2013/30 provides that 'Member States shall require companies registered in their territory and conducting, themselves or through subsidiaries, offshore oil and gas operations outside the Union as licence holders or operators to report to them, on request, the circumstances of any major accident in which they have been involved'.[67]

The high costs of doing business in the Arctic suggests that only the world's largest oil and gas companies may have the financial, technical, and managerial strength to meet the costs and long lead-times for projects that are dictated by challenging Arctic conditions.[68] Therefore, oil giants like BP and Shell, whose headquarters are based in EU Member States (London and The Hague, respectively) have to follow Directive 2013/30 and report their major accidents in the Arctic. Having this type of control over companies such as BP and Shell is a significant initial step to improving the safety of offshore drilling in the Arctic. It will go some way to ensuring that big oil companies based in the EU think long and hard before they embark on a risky adventure in the Arctic.[69]

Nevertheless, this is only an initial step. The reporting obligation only covers major accidents. This obligation should be expanded to activities related to prevention, reduction and control of pollution from offshore oil and gas operations. Moreover, there is to date no standard for reporting. Common reporting standards should be developed for oil companies regardless of whether such companies are registered in the EU or conducting offshore activities within European waters. Furthermore, if oil companies are unwilling to report their activities outside the EU,[70] Directive 2013/30 provides no solution to ensure the compliance of reporting obligations by oil companies. National authorities might make use of a 'name and shame list', which publishes the names of those oil companies who are in violation of reporting obligations.

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[66] Directive 2013/30/EU, n. 15 above, at preamble, paragraph 52 ('The Arctic waters are a neighbouring marine environment of particular importance for the Union, and play an important role in mitigating climate change. The serious environmental concerns relating to the Arctic waters require special attention to ensure the environmental protection of the Arctic in relation to any offshore oil and gas operation, including exploration, taking into account the risk of major accidents and the need for effective response. Member States who are members of the Arctic Council are encouraged to actively promote the highest standards with regard to environmental safety in this vulnerable and unique ecosystem, such as through the creation of international instruments on prevention, preparedness and response to Arctic marine oil pollution, and through building, inter alia, on the work of the Task Force established by the Arctic Council and the existing Arctic Council Offshore Oil and Gas Guidelines.').

[67] Ibid., Article 20.1.

[68] N. Hong, 'The Energy Factor in the Arctic Dispute: A Pathway to Conflict or Cooperation?', 5:1 *Journal of World Energy Law and Business* (2012), 13.

[69] 'Europe to Get its First EU-wide Offshore Oil and Gas Law', *EurActiv* (22 February 2023), found at: <www.euractiv.com/energy/europe-get-eu-wide-offshore-oil-news-518002>.

[70] It is beyond the scope of this article to discuss how to ensure oil companies that are registered outside the EU but are beneficially controlled by EU oil giants such as BP and Shell fulfil their reporting obligations under Directive 2013/30.

In the aftermath of the *Erika* oil tanker disaster, the European Maritime Safety Agency (EMSA) was established by Regulation 1406/2002.[71] The EMSA provides technical and scientific advice to the Commission in the field of maritime safety and prevention of pollution by ships in the continuous process of updating and developing new legislation, monitoring its implementation and evaluating the effectiveness of the measures in place. The role of EMSA was considerably expanded by Regulation 724/2004 to include an increased emphasis on maritime security alongside the response to pollution by ships.[72] In practice, the EMSA is playing an increasingly important role in monitoring the implementation of EU legislation on shipping given the Commission's lack of human resources. Assisted by the EMSA, the Commission issues several reasoned opinions to Member States every year, and does not hesitate to take Member States to the CJEU when necessary.[73]

Directive 2013/30 also sets out the responsibilities of the EMSA. However, relative to its significant role in the shipping industry, the EMSA has played only a limited role in the field of offshore oil and gas operations. According to Article 10 of Directive 2013/30/EU, the EMSA shall 'assist the Commission and the affected Member State, *on its request*, in detecting and monitoring the extent of an oil or gas spill'.[74] The EMSA shall also 'assist Member States, *at their request*, with the preparation and execution of external emergency response plans, especially when there are transboundary impacts within and beyond offshore waters of Member States'.[75] The EMSA's role could be strengthened so as to ensure the compliance of EU oil companies in the Arctic with Directive 2013/30. For example, the EMSA could be authorized to send inspection staff to offshore oil and gas installations outside EU waters operated by companies registered in EU Member States. The implementation of EU standards by EU oil companies operating in the Arctic could pave the way for the EU to enhance its regulatory role in offshore oil and gas operations in the Arctic.

## *INDIRECT APPLICATION OF EU STANDARDS IN THE ARCTIC*

### The Brussels effect

The EU has the world's largest internal market, supported by strong regulatory institutions. Trading with the EU requires foreign companies to adjust their conduct or production to EU standards. While the EU regulates only its internal market, multinational corporations often have an incentive to standardize their production globally and adhere to a single rule.[76] This converts the EU rule into a global rule. This was labelled by Anu Bradford as the 'de facto Brussels effect'.[77] Unlike negotiated standards and unilateral coercion, this kind of regulatory power that the EU possesses is more durable, more deployable, and less easily undermined by others.[78] The EU has succeeded in using market access as a tool to leverage the 'migration' of

[71] Regulation 1406/2002/EC of 27 June 2002 Establishing a European Maritime Safety Agency, [2002] OJ L208/1.
[72] Regulation 724/2004/EC of 31 March 2004 Amending Regulation (EC) No 1406/2002 Establishing a European Maritime Safety Agency, [2004] OJ L129/1, Article 2.
[73] European Commission, Infringement Proceedings in the Field of Maritime Transport (2015), found at: <http://ec.europa.eu/transport/media/infringements/proceedings/maritime_en.htm>.
[74] Directive 2013/30/EU, n. 15 above, Article 10.2(b) (emphasis added).
[75] Ibid., Article 10.2(c) (emphasis added).
[76] A. Bradford, 'The Brussels Effect', 107:1 *Northwestern University Law Review* (2012), 1, at 5.
[77] Ibid., at 6.
[78] Ibid., at 10.

its frequently demanding norms abroad.[79] For example, Member States are required by the Seafarers Directive to ensure that only seafarers properly trained and certified in accordance with the relevant international standards can serve on ships that are registered in EU.[80] As a result, seafarers in a third country have to follow EU standards for their training in order to work in EU-flagged vessels.

The Brussels effect could possibly be applied in the Arctic as well. There are generally three different types of pollution deriving from offshore oil and gas operations: intentional pollution, accidental pollution and operations pollution. Operational pollution is pollution arising as a result of the normal operation of offshore installations, such as discharges of oil in produced water, contaminated drill cuttings and muds, production chemicals, sewage, garbage, deck drainage, naturally occurring materials (radionuclides, heavy metals and aromatics) as well as atmospheric emissions.[81] Pollution from offshore oil and gas operations is like vessel-source pollution, which is most well known due to several high profile accidents such as *Torrey Canyon* (1967), *Amoco Cadiz* (1987), *Exxon Valdez* (1989), *Erika* (1999) and *Prestige* (2002). In fact, the daily discharge of oil and oily mixtures, noxious liquid chemicals, sewage, garbage and air pollution from ships are the main cause of long-term damage to the marine environment.[82] While the scale of operational pollution from offshore oil and gas activities should not be exaggerated, it represents a growing form of hazard to the marine environment, especially in sensitive coastal or Arctic waters.[83]

Directive 2013/30 aims at establishing minimum requirements for preventing major accidents in offshore oil and gas operations and limiting the consequences of such accidents.[84] It pays most attention to accidental pollution. However, in the future, Directive 2013/30 could also set up uniform construction, design, equipment and manning standards (CDEM standards) to prevent operational pollution from offshore installations within European waters. Uniform CDEM standards in European waters would not only improve safety levels of offshore oil and gas operations from the North Sea to the Mediterranean, but could potentially also establish a good example for industry performance in neighbouring waters, such as the Arctic. World Trade Organization (WTO) law prevents countries from restricting imports from countries with less stringent regulations unless the importing country can provide a scientific justification for the restriction or if the restriction is necessary to protect public health or related to conservation of the environment.[85] The EU, however, could ban the import of offshore oil and gas produced in the Arctic without following EU standards for the protection of the Arctic marine environment. This might be more effective than bilateral negotiations to persuade Arctic States, particularly Russia, to adopt high safety standards. This might also be good news for the oil and gas industry as companies conducting offshore oil and gas operations will no longer face different standards in different national waters within the EU.

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[79] See J. Scott, n. 18 above, at 88.

[80] Directive 2008/106/EU of 19 November 2008 on the Minimum Level of Training of Seafarers, [2008] OJ L323/33.

[81] S. Vinogradov and J.P. Wagner, 'International Legal Regime for the Protection of the Marine Environment against Operational Pollution from Offshore Petroleum Activities', in: Z.G. Gao (ed.), *Environmental Regulation of Oil and Gas* (Kluwer Law International, 1998), 93, at 93-94.

[82] IMO, 'International Shipping Facts and Figures – Information Resources on Trade, Safety, Security, Environment, Maritime Knowledge Centre' (IMO, 2011), at 24.

[83] See S. Vinogradov and J.P. Wagner, n. 81 above, at 97.

[84] Directive 2013/30/EU, n. 15 above, Article 1.1.

[85] General Agreement on Tariffs and Trade 1994 (Marrakesh, 15 April 1994; in force 1 January 1995), Article XX. See A. Bradford, n. 76 above, at 54.

## European Economic Area

EU efforts to create a role for itself in the Arctic have had to take the opinion of Arctic States into careful consideration. It is reasonable to expect Arctic States, in particular the five coastal States, are the most important external actors in the EU's pursuit of a role in the High North.[86] In the case of offshore oil and gas operations, Norway is playing a key role. Norway has traditionally been one of the States most closely involved in the management of the Arctic.[87] It is Europe's largest oil producer and the world's third largest gas exporter.[88] Norway is a leading country in Arctic hydrocarbon production, which has geographical advantages and extensive experience and knowledge of energy production at sea.[89] Moreover, Norway is a contracting party of the EEA Agreement. The EEA Agreement reaffirms the high priority attached to the privileged relationship between the EU, its Member States and the European Free Trade Association (EFTA) States (Iceland, Liechtenstein, Norway and Switzerland), which is based on proximity, long-standing common values and European identity.[90] The EEA Agreement aims to promote a continuous and balanced strengthening of trade and economic relations between contracting parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area.[91] The non-EU members of the EEA (Iceland, Liechtenstein and Norway) have agreed to enact legislation similar to that passed in the EU in relation to four fundamental freedoms (free movement of goods, services, capital and persons). With regard to the policy fields encompassed by the EEA Agreement, the non-EU members of the EEA are integrated to the same extent as full members are as far as policy harmonization is concerned.[92] Theoretically speaking, via the EEA Agreement, EU law regarding offshore oil and gas operations could possibly be implemented in the Norwegian part of the Arctic as well.

To ensure homogeneity between EEA law and the constantly evolving internal market of the EU, novel EU legislation of relevance to the EEA is continuously added to the EEA Agreement through decisions of the EEA Joint Committee[93].[94] Interestingly, Directive 2013/30 has identified itself as 'EEA relevant'. Nevertheless, this position has been challenged by Norway.[95] The Commission and Norway should, through the EEA Joint Committee, make a compromise to incorporate Norway into the implementation of Directive 2013/30. According to empirical findings, Norwegian practice regarding EEA-related EU

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[86] N. Wegge, 'The EU and the Arctic: European Foreign Policy in the Making', 3:1 *Arctic Review on Law and Politics* (2012), 6, at 11.
[87] M. Campins Eritja, 'The European Union and the North: Towards the Development of an EU Arctic Policy?', 27 *Ocean Yearbook* (2013), 463.
[88] U.S. Energy Information Administration, 'Norway' (28 April 2014), found at: <www.eia.gov/countries/cab.cfm?fips=NO>.
[89] Norwegian Ministry of Foreign Affairs, *The High North, Visions and Strategies* (2011), at 15.
[90] Agreement on the European Economic Area (Porto, 2 May 1992; in force 1 January 1994), at preamble, paragraph 2.
[91] Ibid., Article 1.
[92] M. Egeberg and J. Trondal, 'Differentiated Integration in Europe: The Case of EEA Country, Norway', 37:1 *Journal of Common Market Studies* (1999), 134.
[93] The EEA Joint Committee is responsible for the management of the EEA Agreement and typically meets six to eight times a year. It is a forum in which views are exchanged and decisions are taken by consensus to incorporate EU legislation into the EEA Agreement. See <www.efta.int/eea/eea-institutions/eea-joint-committee>.
[94] H.H. Fredriksen, 'Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area', 18:6 *European Law Journal* (2012), 869.
[95] See M. Luszczuk *et al.*, n. 8 above, at 83.

legislation has been quite consistent with other EU Member States.[96] Norway has implemented most EU legislation in the energy sector. Moreover, Norway played an important role in influencing the EU's Integrated Maritime Policy,[97] in particular with regard to the policy's Arctic dimension.[98] It is also worth noting that Norway,[99] the EU and even the UK[100] share common interests in promoting the highest environmental and drilling standards for offshore oil and gas operations in the Arctic. Therefore, it would be a win-win situation if Norway and the EU could finally find a compromise regarding the implementation of Directive 2013/30. Through Norway, the regulatory role of the EU regarding offshore oil and gas operations could be much stronger in the Arctic. Meanwhile, with the 28 EU Member States, Norway could possibly in a better position to upload its offshore oil and gas standards to the international level.

## TOWARDS AN ARCTIC-SPECIFIC LEGALLY BINDING AGREEMENT

The Commission and EU Member States should promote high safety standards for offshore oil and gas operations at the international level in relevant global and regional fora, in particular the Arctic Council.[101] Given the fact that there are no universally agreed international standards for offshore drilling on the continental shelf, an international agreement would provide the industry with a standard to meet, regardless of where in the world it was drilling.[102] The EU could support this kind of initiative. For example, the Global Ocean Commission,[103] in its Rescue Package for the Global Ocean, proposes to adopt and improve international safety and environmental standards for offshore drilling on the continental shelf, including regional protocols to establish and implement such standards, with provisions for response-preparedness and capacity building in developing countries.[104] A similar proposal has been initiated by the Indonesian Government after the 2009 Montara Oil Spill in the Timor Sea, off the northern coast of Western Australia.[105] However, even if an international convention on offshore drilling could be adopted in the foreseeable future, it is not that meaningful for the Arctic. An international convention has to compromise interests from around the world, which may not be able to provide highest safety standards for the Arctic.

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[96] See M. Egeberg and J. Trondal, n. 92 above, at 138.

[97] Communication by the European Commission of 10 October 2007, An Integrated Maritime Policy for the European Union, COM(2007) 575.

[98] N. Wegge, 'Small State, Maritime Great Power? Norway's Strategies for Influencing the Maritime Policy of the European Union', 35:3 *Marine Policy* (2011), 335.

[99] 'One of the key policy objectives of Norway's High North policy is to ensure an integrated, ecosystem-based management regime that safeguards biodiversity and provides a basis for sustainable use of resources.' Norwegian Ministry of Foreign Affairs, n. 89 above, at 25.

[100] 'The UK is very aware of the environmental risks associated with oil, gas and mining activities in parts of the Arctic. The UK will advocate for the use of the highest environmental and drilling standards in the Arctic, as elsewhere, and will provide advice where this is sought.' Polar Regions Department, Foreign and Commonwealth Office, United Kingdom, *Adapting to Change: UK Policy towards the Arctic* (2013), at 21.

[101] The EU believes that the Arctic Council is the most important forum for international cooperation in the region. See European Commission, n. 51 above, at 27.

[102] Global Ocean Commission, *From Decline to Recovery, a Rescue Package for the Global Ocean* (Global Ocean Commission, 2014), at 67.

[103] The Global Ocean Commission is a recently established nongovernmental organization, originated as an initiative of The Pew Charitable Trusts, in partnership with Somerville College at the University of Oxford, Adessium Foundation and Oceans 5.

[104] See Global Ocean Commission, n. 102 above, at 64.

[105] IMO, Report of the Legal Committee on its ninety-seventh session, LEG 97/15 (1 December 2010), found at: <http://www.uscg.mil/imo/leg/docs/leg97-report.pdf>, at 27-29.

It is therefore suggested that the EU should make significant efforts to promote an Arctic-specific legally binding agreement on offshore oil and gas operations, which would include the highest safety standards, within the Arctic Council. As the EU is not a coastal State of the Arctic, it has no voting rights in the Arctic Council. The EU's actions in the Arctic might also be seen by Arctic States as a 'political intrusion'. Nevertheless, as a major consumer, importer and technology provider of Arctic energy and raw materials, the EU should definitely have a say in the governance of offshore oil and gas operations in its neighbouring waters, which include the Arctic.

As mentioned above, the EU has established minimum requirements for preventing major accidents in offshore oil and gas operations and limiting the consequences of such accidents by Directive 2013/30. In the foreseeable future, it is suggested that Directive 2013/30 could also be extended to cover CDEM standards for the prevention of operational pollution from offshore oil and gas activities. The EU therefore has set up a model for this Arctic-specific legally binding agreement. Moreover, market access could be a tool for the EU to incentivize Arctic States to consider benefits of the adoption of a legally-binding agreement.

## CONCLUSIONS

Ideally, for the protection of the vulnerable Arctic, offshore oil and gas drilling in the Arctic should be completely banned. However, a ban seems to be impossible as long as the world economy still depends on fossil fuels. At the same time, the current international and regional regime for the regulation of Arctic offshore oil and gas operations is weak and fragmented. Therefore, the EU, as a major player in global energy politics, is obliged to make a contribution to enhance the current regime for a sustainable future of the Arctic.

The EU appears to have a marginal role in Arctic policy making due to the fact that it has no coastal line in the Arctic. However, as outlined in this article, there are a number of potential ways in which the EU may be able to play an influential part. The EU has already taken the initial step by requiring companies registered in the EU to report major accidents outside the EU waters, such as in the Arctic. This obligation could be strengthened, for instance, by the development of common reporting standards, The EU could set up uniform CDEM standards regarding the prevention of operational pollution from offshore oil and gas operations in the EU, which might establish a good example for its neighbouring waters, such as the Arctic. The EMSA can be authorized to supervise EU companies' offshore activities in the Arctic. All these options could possibly provide a way for the EU to enhance its regulatory role in offshore oil and gas operations in the Arctic.

In addition, if the EU could find a compromise with Norway to implement Directive 2013/30, the regulatory role of the EU on offshore oil and gas operations could be much stronger in the Arctic. Finally, it is suggested that the EU should make the utmost effort to promote an Arctic-specific legally binding agreement with the highest safety standards for offshore oil and gas operations.

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